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IN THE

Supreme Court of the United States

October Term, 1958.

No. _____

HENRY B. WALKER, JR., Trustee, Et Al., - *Petitioners,*

v.

FELMONT OIL CORPORATION, Et Al., - - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on December 18, 1958.

OPINIONS BELOW.

The opinion of the District Court and the order and judgment thereon, printed in Appendix B hereto, *infra*, pp. 35 and 48, are reported in 136 F. Supp. 584. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 50, is reported in 240 F. 2d 912. The subsequent order of the Circuit Court of Appeals on petitions for rehearing and the order on mandate, printed in Appendix B hereto, *infra*, pp. 58 and 60, are unreported. The orders of the District Court dismissing the action are

unreported and are printed in Appendix B hereto, *infra*, pp. 61 and 62. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra*, p. 63, is reported in 262 F. 2d 163.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 18, 1958 (Appendix B, *infra*, p. 67). A timely petition for rehearing filed on January 7, 1959, was denied on January 22, 1959 (Appendix B, *infra*, p. 67). An Order was entered by this Court on April 1, 1959, extending the time for filing petition for writ of certiorari to June 20, 1959. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

In view of the number of questions presented and their inter-relationship, and to avoid undue repetition, related questions have been grouped by subject matter.

I. The Discretion of the District Court.

(A) Whether any right to exercise discretion remains in the District Court after it has once exercised such discretion in assuming and retaining jurisdiction of this action for a period of more than three years.

(B) Whether the District Court abused its discretion, if any remained, in dismissing this action in which it had exercised jurisdiction for more than three years and in which the rights of the parties could be fully determined.

(C) Whether the nature and subject matter of this action present such exceptional circumstances as to warrant

the District Court's refusal to continue exercising jurisdiction thereof.

(D) Whether the Court of Appeals, in accepting pleadings in a case on appeal to it from an order of dismissal on the District Court's own motion, effectively substitutes its discretion to exercise jurisdiction for that of the District Court.

II. Practice and Procedure in the Circuit Court of Appeals.

(A) Whether the Federal Rules of Civil Procedure may be followed or applied by the Court of Appeals in the absence of any applicable rule of its own.

(B) Whether the Court of Appeals has the power to permit the filing of a supplemental complaint in a case on appeal from an order of dismissal on the District Court's own motion when the issues have not theretofore been joined nor trial commenced nor any evidence introduced.

(C) Whether the Court of Appeals, having granted appellants' motion for leave to file a supplemental complaint in a case on appeal from an order of dismissal on the District Court's own motion prior to all the issues being joined, and having granted defendants' motion for leave to file answers to such supplemental complaint, and having thereafter permitted the filing of such supplemental complaint and answers, is acting within its proper authority in subsequently issuing an order overruling appellants' said motion and treating said supplemental complaint and answers thereto as though they had been expunged from the record.

(D) Whether the Court of Appeals, in the proper exercise of its judicial functions, has the duty to keep written minutes or records of its orders so that the certified record

in the case will reflect what action the court took on motions made in open court.

III. Effect of Amended and Supplemental Pleadings.

(A) Whether the judgment of the District Court entered on September 30, 1957, can expunge from the record, or invalidate, or affect in any way, amended and supplemental complaints and answers thereto filed by leave of the Court of Appeals after the date of the District Court's judgment, which pleadings raise issues and pray for relief not before the District Court at the time the action was dismissed.

(B) Whether the judgment of the Court of Appeals, affirming the judgment of the District Court, can expunge from the record, or invalidate, or affect in any way, those pleadings filed by leave of the Court of Appeals after the date of the District Court's judgment.

(C) Whether a valid and subsisting action based on the pleadings filed in the Court of Appeals after the date of the District Court's judgment is currently pending in the Court of Appeals, which action must now be remanded to the District Court for further proceedings.

IV. District Court's Compliance with Mandate of Court of Appeals.

(A) Whether the District Court effectively complied with the mandate of the Court of Appeals in this case.

V. Jurisdiction.

(A) Whether jurisdiction exists in this case based on diversity of citizenship.

(B) Whether jurisdiction exists in this case based on constitutional questions.

STATUTES INVOLVED.

The pertinent statutory provisions are set forth in Appendix A to this petition, *infra*, p. 33). They include: K.R.S. 413.010; K.R.S. 413.150; 62 Stat. 930, 28 U. S. C. § 1331; 62 Stat. 930, 28 U. S. C. § 1332; 62 Stat. 964, 28 U. S. C. § 2201; 62 Stat. 964, 28 U. S. C. § 2202.

STATEMENT OF THE CASE.

The action, as originally filed July 16, 1954, merely sought a declaratory judgment quieting title in a trustee-owner of patents granted by the Commonwealth of Kentucky to lands lying in the Ohio River (Appendix C, *infra*, p. 73). Jurisdiction obtained based on diversity of citizenship, and the District Court assumed and exercised jurisdiction. Numerous pleadings were filed; additional parties plaintiff and defendant were added and the issues were enlarged to include the quieting of title to additional lands, including an island (Amended Complaint, Appendix C, *infra*, p. 73; Docket Entries, Appendix C, *infra*, pp. 68-71). Prior to any trial of the matter, an appeal was taken from a pre-trial judgment on certain legal issues (Appendix B, *infra*, pp. 35 and 48).

The Court of Appeals vacated the judgment and remanded the case to the District Court for a determination of two major questions first raised by the Court of Appeals: (1) whether jurisdiction exists, and (2) whether, if it does exist, it should be exercised (Appendix B, *infra*, pp. 54, 58 and 59). Thereafter a suit was filed in the Henderson Circuit Court of Henderson County, Kentucky, by the Farm Bureau Oil Company, Inc.—which is not a party to this

action—against numerous defendants, including all the parties to this action. This suit concerns itself with the proceeds of oil wells located on a small part of the lands here involved, but does not concern itself with any lands belonging to the original, sole plaintiff in this action, *i. e.*, Henry B. Walker, Jr., Trustee (Printed page 53a of Certified Record). A motion to stay proceedings pending state court adjudication was filed by one of the defendants and was opposed by all of the plaintiffs and two of the defendants (Printed pages 48a, 60a, 63a and 65a of Certified Record). A hearing was had on this motion. Shortly thereafter, without granting a hearing on the questions raised by the Court of Appeals and without ruling on the question of jurisdiction in accordance with the mandate of the Court of Appeals, the District Court summarily dismissed the action on its own motion, purportedly under its discretionary power, even though it had already assumed and exercised jurisdiction in the matter for a period of more than three years (Orders, Appendix B, *infra*, pp. 61 and 62; Docket Entries, Appendix C, *infra*, pp. 68-72). The petitioners herein, who were the plaintiffs below, appealed from this judgment of the District Court.

After the appeal had been perfected, plaintiffs-appellants filed with the Court of Appeals a motion for leave to file a second amended complaint which raised constitutional questions as additional grounds for jurisdiction and which prayed for injunctive relief as an additional remedy (Printed page 78a of Certified Record). The motion was granted and the second amended complaint filed on April 17, 1958 (Appendix C, *infra*, p. 76). As of December 1, 1958, the date of the oral argument herein, no defendant-appellee had filed an answer to the said second amended complaint (Docket Entries in Court of Appeals, Appendix C, *infra*,

p. 74). Just prior to the argument, plaintiffs-appellants filed with the Court of Appeals their motion for leave to file a second supplemental complaint to which motion the said second supplemental complaint was attached, which pleading raised the affirmative defense of the Statute of Limitations (Appendix C, *infra*, pp. 85 and 87).

At this juncture in their statement of the case, the petitioners must leave the record because the record of the ensuing proceedings is non-existent. Petitioners contend that the proceedings which occurred in open court are as follows (Affidavits, Appendix C, *infra*, pp. 89 and 92): During the course of the oral argument Judge Florence Allen, the Chief Judge, asked the plaintiffs-appellants if they wished their motion brought up at that time. Copies of the motion with the attached second supplemental complaint had been mailed to all the defendants-appellees, but additional copies were thereupon distributed to those present. Judge Allen then asked the defendants-appellees whether they had any objections to the motion. No objections were made. Thereupon, in open court, Judge Allen granted said motion. Counsel for two of the defendants-appellees then asked the Court for leave to file answers to both the second amended complaint and the second supplemental complaint. Judge Allen then asked the plaintiffs-appellants if they had any objections, and no objections were made. She thereupon granted the defendants-appellees leave to file answers within a reasonable time. On December 18, 1958, the Court entered an order overruling plaintiffs-appellants' motion for leave to file a second supplemental complaint (Appendix C, *infra*, p. 89). Not until petitioners attempted to procure the certified record in this case did they learn that there is no written order, or entry or minute in the record which relates to the above

proceedings in open court on December 1, 1958. Petitioners have made a serious effort to have the record corrected to reflect accurately the proceedings which took place, and have carried on an extensive correspondence with members of the court and opposing counsel (Appendix C, *infra*, pp. 94-104). One of the judges, Judge Martin, has made no reply. Judge Allen has given no indication to petitioners of her views on the matter (Appendix C, *infra*, p. 95). Judge Miller, in a lengthy letter contends that he understood that the motion was taken under advisement (Appendix C, *infra*, p. 96). Henderson County, one of the defendants-appellees represented at the hearing, now supports the contention of Judge Miller (Appendix C, *infra*, p. 101), although an earlier letter to the Clerk of the Court is susceptible of a contrary interpretation (Appendix C, *infra*, p. 93). Two of the defendants-appellees represented at the argument agree, in general, with the contention of the petitioners (Appendix C, *infra*, pp. 102 and 104). In support of their contention, petitioners submit the following: The second supplemental complaint is on file with the Clerk of the Court and is stamped "FILED DEC. 1-1958 CARL W. REUSS, CLERK" (Appendix C, *infra*, p. 87; also Certified Record). Two defendants-appellees, including Henderson County, asked for and were granted leave to file answers to the second supplemental complaint. Four defendants-appellees, including Henderson County, did file answer to the said second supplemental complaint and referred to said complaint as being "filed" herein (Appendix C, *infra*, pp. 87 and 88). Counsel for Henderson County, in a letter to the Clerk stated he understood the second supplemental complaint had been filed (Appendix C, *infra*, p. 93). Petitioners, in their petition for rehearing, set out what had occurred (Point I, in Peti-

tion for Rehearing and Memorandum in Support Thereof, included in Certified Record). Petitioners' position was neither denied nor refuted nor referred to in the Court's order denying the petition for rehearing (Appendix B, *infra*, p. 67).

The judgment of the Court of Appeals sustaining the judgment of the District Court was entered on December 18, 1958 (Appendix B, infra, p. 67). A timely petition for rehearing was denied on January 22, 1959, by order of the Court, without written opinion (Appendix B, *infra*, p. 67).

REASONS FOR GRANTING THE WRIT.

In view of the number of questions presented and their interrelationship, the reasons for granting the writ will be grouped under subtitles which correspond to the subject matter of related questions as heretofore set out under QUESTIONS PRESENTED. It is necessary to deal with these matters at some length in this petition because the opinion below failed not only to rule on, but even to consider, most of the points here involved.

I. The Discretion of the District Court.

(A) The Court of Appeals in the instant case has indirectly decided an important question of federal law which has not been, but should be, settled by this Court. That question is set out as I(A) under QUESTIONS PRESENTED. By failing to rule otherwise, the Court of Appeals, in effect, has held that the District Court—after having once exercised its discretion and after having assumed and retained jurisdiction in the case for a period of

more than three years—still retains the power to exercise discretion again in declining jurisdiction and dismissing the action. Petitioners have been able to find no case in point. However, such a proposition is abhorent to logic and conflicts, in principle, with numerous decisions. The basic premises involved have been urged in the court below in brief and arguments and are both simple and irrefutable. The discretion of the District Court is nothing more than the right of option or choice to take or refuse jurisdiction of a case. That discretion is exercised once the court chooses to take and assume jurisdiction. When an option is exercised—that is, when the choice is made—the right is extinguished. An option is a one-time, one-use, expendable commodity. So it is with the court's discretion. Once it has been exercised, no discretion remains. The conclusion is inescapable that, if the court's discretion is exhausted once it has been exercised, the court then has the duty to retain jurisdiction and is without power to dismiss. Any other rule of law would establish a practice which would leave litigants in a constant state of confusion and uncertainty in any case which might seem or become burdensome to a court. This conclusion in no way abridges the court's inherent power to dismiss an action at any time in the event it discovers that jurisdiction does not, in fact, exist.

While the reasoning is different, the same end result is arrived at in a number of decisions. The principle is well expressed by the court in *Firemen's Ins. Co. of Newark* v. *Smith*, 83 F. Supp. 668, 672 (W. D. Mo., 1949), in these words:

> "The court, having assumed jurisdiction, it is the duty of the court to determine all the issues as between the parties, and to make a full and complete disposition of the entire case. *Tennessee Coal, Iron & R. Co.* v.

Muscoda Local No. 123, etc., 5 Cir., 1943, 137 F. 2d 176, affirmed 321 U. S. 590, 88 L. Ed. 949, 152 A. L. R. 1614; *Coon* v. *Bottolfsen*, D. C., 60 F. Supp. 316; *Home Ins. Co. of N. Y.* v. *Trotter*, 8 Cir., 130 F. 2d 800."

See also *Manchester Gardens* v. *Great West Life Assurance Co.*, 205 F. 2d 872, 875 (C. A. D. C., 1953).

The Court of Appeals in the instant case has held that there was no abuse of discretion by the District Court in dismissing this action. The issue involved is raised as I(B) under QUESTIONS PRESENTED. In view of the authorities cited above, it seems clear that the court abused its discretion, if any remained, or failed in its duty if there was no discretion. Neither the appellees nor the court below in its opinion answered or refuted these points. They merely ignored them.

(B) The decision of the court below in the instant case is in direct conflict with a decision of the Supreme Court. Petitioners cited and discussed at length in brief and argument the case of *Meredith* v. *Winter Haven*, 320 U. S. 228, 88 L. Ed. 9 (19), which relates in detail those actions in which the nature and subject matter confer on the court a discretionary power as to the exercise of jurisdiction. Since the authorities cited in the *Meredith* opinion include actions for declaratory judgments as well as other kinds of actions, it must be concluded that the exercise of jurisdiction in a declaratory judgment action is largely based on the same considerations as are given any other action. As a matter of fact, the *Meredith* case was an action for a declaratory judgment seeking a declaration on questions involving Florida constitutional and statutory law, as well as seeking injunctive relief as an implementation of this declaration. In this respect, it was a combined action for a declaratory judgment and an injunction, just as the instant case by its

second amended complaint is a combined action for a declaratory judgment and an injunction. In the *Meredith* case this Court held that the petitioners therein were entitled to have their action adjudicated in the foreign courts. At page 234 of its opinion this Court states:

> "But we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> "The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment. (Authorities cited.) When such exceptional circumstances are not present, denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."

Under the circumstances, the law as stated in the *Meredith* case is controlling and the decision of the Circuit Court of Appeals in the instant case is in direct conflict therewith.

The District Court's order of dismissal in the instant case feebly attempts to assert exceptional circumstances so as to invoke the discretionary powers of courts of equity

and thereby decline jurisdiction. In that order the District Court states:

> "This case does involve difficult questions requiring interpretation of state laws that affect the public policy of Kentucky, and since the rights of the parties can be adequately determined in the pending state action, there is no justification for further proceedings that could lead to a possible conflict between state and federal rulings."

A statement such as this is an absolutely necessary prerequisite to try to bring the instant case within the classification of those in which discretion might be exercised in refusing jurisdiction. On the other hand, the court's position is untenable if its statement above is successfully disproved. Petitioners have disproved this statement on every count, and their contentions have gone unrefuted and uncontroverted—and been completely ignored.

Let us analyze briefly the contentions of the District Court. First, that the case involves "difficult questions requiring interpretation of state laws that affect the public policy of Kentucky." The case involves, *inter alia*, the ownership of lands granted by patent from the Commonwealth of Kentucky. It is a general principle of law that a land grant is a contract, within the protection of the Federal Constitution. *Appleby* v. *New York*, 271 U. S. 364, 391, 70 L. Ed. 992; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 24, 35 L. Ed. 363; *American Emigrant Co.* v. *Adams County*, 100 U. S. 61, 25 L. Ed. 563; *Davis* v. *Gray*, 16 Wall. (U. S.) 203, 232, 21 L. Ed. 447; *Fletcher* v. *Peck*, 6 Cranch (U. S.) 87, 137, 3 L. Ed. 162; *Huidekoper* v. *Douglass*, 3 Cranch (U. S.) 1, 70, 2 L. Ed. 347. Hence, a contract between an individual and the state is protected by the Constitution equally with a contract between private parties. *Columbia*

R. Gas & E. Co. v. *South Carolina*, 261 U. S. 236, 67 L. Ed. 629; *Aikins* v. *Kingsbury*, 247 U. S. 484, 62 L. Ed. 1226; *Fletcher* v. *Peck*, 6 Cranch (U. S.) 87, 135, 3 L. Ed. 162. Petitioners have alleged that the Commonwealth of Kentucky and its State Property and Buildings Commission have attempted to deprive them of their property without due process of law and impaired the obligations of their patent contracts. It may well be that the abrogation of patent contracts is the public policy of the Commonwealth of Kentucky done in accordance with state law. If so, the issue should certainly be settled in a federal court rather than a state court where the rights of citizens of other states might conceivably be given less protection. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 88 L. Ed. 9, 13 (1943); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653, 656 (C. A. 10, 1946). The statement by the District Court wholly fails on this point.

The patents here involved are regularly issued; are signed by the proper officers; are in due form and are presumably valid and are, therefore, not subject to any collateral attack, but can be set aside only in judicial proceedings instituted on behalf of the state. 42 Am. Jur., Public Lands, § 86, p. 861; *United States* v. *Price*, 111 F. 2d 206, 208 (C. A. 10, 1940). It does not require the interpretation of state laws affecting the public policy of Kentucky for the court to determine that the patents are not subject to collateral attack by any of the parties defendant and that the Commonwealth of Kentucky has never brought any proceedings to have them set aside. Such an action is now barred by the Kentucky Statute of Limitations which by its specific terms applies to the Commonwealth as well as to private persons. Kentucky Revised Statutes 413.010, 413.150 (Appendix A, *infra*, p. 33). The application of

the Statute of Limitations hardly involves difficult question requiring interpretation of state law. All of the other issues involved in the merits of petitioners' case involve well-settled law. Thus the statement by the District Court wholly fails on this point also.

The District Court's order states further: "since the rights of the parties can be adequately determined in the pending state action, there is no justification for further proceedings . . . ." This observation indicates that the court had no comprehension of the issues involved. As has been pointed out previously herein, this action was initially filed by Henry B. Walker, Jr., Trustee, to quiet title in him to lands granted by patent by the Commonwealth of Kentucky. Later, other parties plaintiff were added and consequently other lands became involved. In the state court suit, filed more than three years after the District Court action by a pipeline company over the proceeds of oil from a small part of the lands involved in the District Court suit, Henry B. Walker, Jr., Trustee, is named a party defendant. Yet he neither owns, nor claims to own, any of the land involved nor has any interest in, nor claims any interest in, the proceeds of the oil involved, which proceeds are the *res* of the state action. For the court to say that the rights of the parties can be determined in the pending state action is both ridiculous and irresponsible. In the state court suit, Henry B. Walker, Jr., Trustee, can have none of his rights determined; he cannot have the title to his lands quieted in him; he cannot obtain the injunctive relief and other relief he has prayed for; and, finally, he cannot assert the affirmative defense of the Statute of Limitations. These rights should have been protected by the District Court and the Court of Appeals. A grave injustice has been committed in dismissing this action. In addition, the decision

is in direct conflict with numerous decisions which hold to the effect that the court first acquiring jurisdiction is entitled to maintain the same until its duty is fully performed and its jurisdiction is exhausted. *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231, 67 L. Ed. 226, 231 (1922); *Crosley Corporation* v. *Hazeltine Corporation*, 122 F. 2d 925, 930 (C. A. 3, 1941); *Maryland Casualty Co.* v. *Consumer's Finance Service, Inc.*, 101 F. 2d 514, 515 (C. A. 3, 1938); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653, 656 (C. A. 10, 1946). Thus the statement by the District Court wholly fails on this point also.

(C) The decision of the court below in the instant case relies on a number of Supreme Court cases as authorities for holding that it was a proper exercise of discretion by the District Judge to decline jurisdiction in a declaratory judgment action "of this kind." None of the cases cited were "of this kind." Far from supporting the proposition relied on by the Court of Appeals, these cases conflict in principle with the opinion in the instant case. The authorities relied on by the Court of Appeals in its opinion are the following:

(1) *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 87 L. Ed. 1407 (1943), which was an action for a declaratory judgment involving a state tax matter in which an adequate remedy was provided in the state courts, so that it came within the statutory limitation imposed on district court jurisdiction by 28 U. S. C. A. Sec. 1341 and, in addition, the questions involved were state matters and were such that equitable rulings had conferred discretion on the court;

(2) *Pennsylvania* v. *Williams*, 294 U. S. 176, 79 L. Ed. 841 (1935), which was *not* an action for a declaratory judg-

ment but was a petition to intervene in a receivership suit and involved the liquidation of an insolvent state bank by a state officer, so that the subject matter was such that equitable ruling had conferred discretion on the court;

(3) *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 87 L. Ed. 1424 (1943), which was *not* an action for a declaratory judgment but for an injunction which involved the domestic policy of the state in governing its administrative agencies, so that equitable rulings had conferred discretion on the court;

(4) *Railroad Commission of Texas* v. *Pullman Co.*, 312 U. S. 496, 85 L. Ed. 971 (1941), which was *not* an action for a declaratory judgment but for an injunction, and discretion was conferred on the court because the case was concerned with delicate constitutional questions of great public interest involving Negro rights, which questions the Court held should first be litigated in the state courts;

(5) *Public Service Commission* v. *Wycoff Company*, 344 U. S. 237, 97 L. Ed. 291 (1952), which was an action for a declaratory judgment in which relief was denied because the Court did not feel that there was an actual controversy and declaratory relief would have foreclosed an administrative agency from making an initial decision in a matter subject to its jurisdiction;

(6) *Brillhart* v. *Excess Insurance Co.*, 316 U. S. 491, 86 L. Ed. 1620 (1942), which was an action for a declaratory judgment in which the cause was remanded to the district court for inquiry into the extent and adequacy of a *prior* similar action in a state court;

(7) *Alabama Public Service Commission* v. *Southern Railway Co.*, 341 U. S. 341, 95 L. Ed. 1002, (1951), which was *not* an action for a declaratory judgment but for an

injunction and involved the regulation of intrastate railroad service wherein an adequate state court review of an administrative order was available.

Each of these cases serves to emphasize the fact that the subject matter of an action is the principal consideration neither in conferring discretion on the court or in justifying the exercise of discretion in refusing jurisdiction. Each of them is clearly distinguishable from the case at bar and completely inapplicable as controlling authority in a declaratory judgment "of this kind". Petitioners argued the inapplicability of these authorities in brief, reply brief, oral argument and petition for rehearing—but to no avail.

(D) The decision of the Court of Appeals in the instant case is in conflict with numerous decisions of other circuits. The general rule is that the Declaratory Judgment Act should be liberally construed and jurisdiction should not be declined in the absence of some cogent reason or exceptional circumstances. In the case of *Maryland Casualty Co.* v. *United Corporation*, 111 F. 2d 443 (C. A. 1, 1940), it was determined that a pending state court suit could not decide all of the questions presented to the District Court. At page 446 the court says:

> "Under such circumstances it has been held, we think rightly, that the application of an insuror for a declaratory judgment cannot be denied as a matter of discretion."

In *United States Fidelity & Guaranty Co.* v. *Koch*, 102 F. 2d 288 (C. A. 3, 1939), at page 294, the court holds that if the judgment will serve a useful purpose and if it will finally settle the litigation, "the declaration must generally be issued". In *American Automobile Ins. Co.* v. *Freundt*, 103 F. 2d 613 (C. A. 7, 1939), at page 616, the court states:

> "A federal court must exercise its jurisdiction in the absence of a showing of facts which constitute a recognized legal ground for a refusal to pass upon the merits of the cause which properly is before it."

See also: *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F. 2d 703, 709 (C. A. 3, 1940); *Maryland Casualty Co.* v. *Consumers Finance Service, Inc.*, 101 F. 2d 514, 515 (C. A. 3, 1938); *American Casualty Co. of Reading, Pa.* v. *Howard*, 173 F. 2d 924, 927 (C. A. 4, 1949); *Tennessee Coal, Iron and R. Co.* v. *Muscoda Local No. 123, etc.*, 137 F. 2d 176, 179 (C. A. 5, 1943); *Mutual Life Ins. Co. of New York* v. *Krejci*, 123 F. 2d 594, 596 (C. A. 7, 1941); *Franklin Life Ins. Co.* v. *Johnson*, 157 F. 2d 653, 656 (C. A. 10, 1946). Not only is the decision in the instant case in conflict with decisions which have been rendered by the other courts of appeals on this point, but it is contradictory to decisions rendered by the same court of appeals. In the case of *Maryland Casualty Co.* v. *Faulkner*, 126 F. 2d 175, 178 (C. A. 6, 1942), the Court of Appeals states the petitioners' position in clear and unambiguous terms:

> "The Congress having conferred upon the federal courts the power to grant declaratory relief in an appropriate case, the right to it is not lightly to be denied . . . The remedy of a declaratory judgment will be refused, granting the court has discretion to decline it, only if it will not finally settle the rights of the parties."

See also: *E. W. Bliss Co.* v. *Cold Metal Process Co.*, 102 F. 2d 105 (C. A. 6, 1939); *Employers Liability Assur. Corp. Ltd.* v. *Ryan*, 169 F. 2d 690, 691 (C. A. 6, 1949); *Dominion Electrical Mfg. Co.* v. *Edwin L. Wiegand Co.*, 126 F. 2d 172, 175 (C. A. 6, 1942).

(E) While petitioners feel that there are numerous authorities to support their contentions, in principle, in regard

to the questions relating to discretion, there seem to be no decisions squarely in point on the questions set out as questions I(A) and I(B) under QUESTIONS PRESENTED. These are important questions affecting numerous litigants in the district courts. There was no direct holding or ruling on these questions by the Court of Appeals, yet the precedents established by its decision could have a deleterious effect on the federal judicial system and cause hardship to countless litigants. For this reason petitioners feel that this Court should settle this matter and thus clarify the uncertainties which now exist in relation to these questions. The Federal Judicial System was initially set up for the purpose of adjudicating matters of this very nature and thereby affording to the citizens of these United States a protection which they might be denied in the courts of the various states. In the case of *The Bank of the United States* v. *Deveaux*, 5 *Cranch* 61, 3 L. Ed. 38, Chief Justice Marshall comments on the reasons and purposes behind the establishment of the Federal Judicial System in these words:

> "The Judicial Department was introduced into the American Constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizens or between citizens of different states. (p. 87)"

Our courts must not be allowed to lose sight of the fact that their chief purpose is the protection of the rights of

our citizens when they are litigants. *Meredith* v. *Winter Haven*, 320 U. S. 228, 234, 88 L. Ed. 9, 13 (1943).

(F) The Court of Appeals has decided an important quesion of federal law which has not been, but should be, settled by this court. Petitioners have been unable to find any decision which answers the question set out as I(D) in QUESTIONS PRESENTED hereinabove. That question was formulated from petitioners' contention that the Court of Appeals effectively overruled the judgment of the District Court and effectively retained jurisdiction of the action by permitting the filing of pleadings in the Court of Appeals. Let us assume, for the sake of argument only, that the District Court had the discretion to dismiss the action as it did. It is well recognized that the Court of Appeals may substitute its judgment for that of the District Court. *Delno* v. *Market Street Ry. Co.*, 124 F. 2d 965, 968 (C. A. 9, 1942). Once the District Court has dismissed an action, it is no longer a currently pending action. If the District Court accepts further pleadings such as an amended complaint it has effectively reassumed jurisdiction and reinstated the action. Following such a procedure, a new order of dismissal would be required to terminate the action. On an appeal from an order of dismissal in the District Court, the Court of Appeals has jurisdiction of the case, but, barring a decision to reverse the District Court, that jurisdiction is limited and circumscribed in that it concerns the naked record in the District Court. However, in accepting pleadings, the Court of Appeals is substituting its discretion for that of the District Court. It is thus effectively overruling the judgment of the District Court and reinstating the action as a currently pending action. As a currently pending action its status is of an entirely different character than that of a dismissed action

on appeal. It would seem that the question on appeal of the order of dismissal would become moot. The Court of Appeals in the instant case ignored and failed to answer or comment on this argument advanced by petitioners, and the question should be answered by this Court.

(G) All of the questions having to do with the existence of discretion and its proper exercise are of extreme importance and affect the rights of numerous litigants in the Federal Courts.

II. Practice and Procedure in the Circuit Court of Appeals.

(A) In stating, in its opinion herein, that the Federal Rules of Civil Procedure govern the procedure in the District Courts, not the Court of Appeals, the Court below was completely evading the issue before it. No one would argue that the Federal Rules govern or control the procedure in the Court of Appeals. On the other hand, it is settled law that a Court of Appeals may make its own rules and adopt any rules it deems wise and, by the same token, may waive its adopted rules whenever necessary. In the case of *United States* v. *Breitling*, 20 How. 252, 254, 15 L. Ed. 900, 902 (1858), this Court clearly states that it is always within the power of a court to suspend its own rules whenever the purposes of justice so require. It follows then that the Court of Appeals can adopt or follow or apply any Federal Rule it chooses to, provided such Rule is not in conflict with settled law applying to the Court of Appeals. In the instant case petitioners filed a motion for leave to file an amended complaint and suggested that the court had the power to grant the motion under Rule 15(d) of the Federal Rules of Civil Procedure. Rule 15(d) would not have conferred any absolute right on the petitioners even

in the District Court. The granting of the motion was entirely discretionary with the court. However, even though the Rules do not "govern or control" the Court of Appeals, Rule 15(d) could be followed or applied in granting the motion, which petitioners contend was done. In the case of *Hines* v. *Royal Indemnity Co.*, 253 F. 2d 111 (C. A. 6, 1958), the court states at page 113:

> "The Court of Appeals, under its authority to make its own rules, has in several circuits adopted the Rules of Civil Procedure, either in whole or in part, where applicable, as a part of its own rules. . . . In other instances the provisions of a certain rule of the Rules of Civil Procedure have been applied by analogy by appellate courts."

It seems remarkable that this same Court of Appeals, in its decision in the instant case, states that appellants' reliance on Rule 15(d) is misplaced since the Rules do not govern the procedure in the Court of Appeals and cites the *Hines* case as authority therefore. In their petition for rehearing, petitioners pointed out the inaplicability of the *Hines* case as authority for the court's proposition and pointed out its authority for petitioners' proposition that the Rules could be followed or applied, but the court ignored this argument and failed to comment thereon.

(B) On the question of the power of the Court of Appeals to permit the filing of a supplemental complaint in the instant case, the Court of Appeals has decided an important question of federal procedure which has not been, but should be, settled by this court. That power, from the point of view of the rules of court, has been discussed in Subsection (A) immediately hereinabove. Here we will touch briefly on another aspect. The Court of Appeals in its opinion in the instant case states:

> "A new issue, not raised by the pleadings in the District Court or considered by it, cannot be raised for the first time on appeal."

and cites four cases as authorities therefor (Appendix B, *infra*, p. 66). Petitioners in their petition for a rehearing carefully distinguished each of the four cases from the instant case and showed that none was in point on the issue here involved (Point IV. in Petition for Rehearing and Memorandum in Support Thereof, included in Certified Record). In the instant case the appeal was from an order of dismissal on the District Court's own motion after it had exercised jurisdiction for more than three years. Trial had not commenced nor had any evidence been introduced. At the time of filing the second supplemental complaint not one defendant had filed an answer to petitioners' amended complaint. After the order of dismissal by the District Court no opportunity was afforded to plead further.

This Court might well wonder why the second supplemental complaint was filed by petitioners in the Court of Appeals. In considering whether jurisdiction of a case should be retained, an appellate court should be concerned with the question of whether the relief prayed for can be granted and whether a final judgment can settle the issues raised by the complaint. In their brief on appeal, the petitioners herein stated their proposed course of action for a determination of all the issues for which the action was brought. They asserted the proposition that the patents were not subject to collateral attack. They also asserted that the patents could only have been set aside by a direct action by the Commonwealth of Kentucky and that the Statute of Limitations was now an effective bar to such direct action. These assertions were not denied or controverted by any of the defendants. The petitioners filed their

second supplemental complaint asserting the affirmative defense of the Statute of Limitations, not for the purpose of obtaining a ruling thereon by the Court of Appeals, but for the purpose of assisting that court in determining whether all the issues raised by the complaint could be settled by a judgment of the District Court and whether the relief prayed for could be granted. It has been held that supplemental pleadings were proper when the ends of justice were advanced, when substantial rights of parties were not violated and when the controversy could thus be simplified. *Missouri Rate Cases*, 230 U. S. 474, 496, 57 L. Ed. 1571 (1913); *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188, 203, 83 L. Ed. 598 (1939); *Adams County v. Northern Pacific Railway Co.*, 115 F. 2d 768, 774 (C. A. 9, 1940). Petitioners herein were not seeking a decision on the merits of the case. This fact distinguishes the case at bar from those cases holding that an issue cannot be raised for the first time on appeal. In those cases relied on by the Court of Appeals in its opinion, the parties sought a determination by the Court of Appeals on the new issue raised therein. On this issue petitioners believe this is a case of first impression and since the issue is an important procedural one it should be resolved by this Court.

(C) The proceedings in the Court of Appeals have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioners have already recounted the proceedings which occurred in open court on December 1, 1958, in reference to the granting of their motion for leave to file a supplemental complaint and the granting of two defendants-appellees' motions for leave to file answers thereto. As was pointed out, the supplemental complaint was marked "Filed" and answers were subsequently filed

thereto by four defendants-appellees. On December 18, 1958, the court entered an order overruling petitioners' motion for leave to file a supplemental complaint and on the same date affirmed the judgment of the District Court. Petitioners take grave exception to these proceedings on several bases.

In the first place, if petitioners' assertions of what occurred are correct, the attempt by the Court to overrule petitioners' motion after it had been granted and after the supplemental complaint had been filed and after answers thereto had been filed is most irregular. It would seem to be nothing more than an abortive and ineffectual attempt to expunge from the record pleadings which were incompatible with the decision which the Court of Appeals had reached. While the granting of the motion in the first instance was certainly within the discretion of the Court, once the motion was granted and pleadings filed by five parties in reliance thereon, the Court should have protected the validity of its own rulings. Any other course can only serve to undermine the foundations of our entire judicial system and cause continuing confusion in all litigation. In the event the Court seriously had questioned its own authority to grant said motion after having done so, it could have accomplished the same result by remanding the case to the District Court with directions to permit the filing of the supplemental complaint therein.

In the second place, if petitioners' assertions as to what occurred are not wholly correct, or if any member of the Court had any impressions which differed materially from those of petitioners, it would seem that any normal or accepted procedure would have compelled the Court to state its views in some form. In their petition for rehearing and memorandum in support thereof, petitioners made

assertions similar to those contained herein and alleged error on the part of the Court for its actions in the matter (Point I, in Petition for Rehearing and Memorandum in Support Thereof, included in Certified Record). The petition for rehearing was denied without comment or opinion. In neither replying to, nor refuting, nor clarifying the situation, the Court, in petitioners' opinion, was compounding its error. Certainly it owed a duty to the litigants to clear up a misunderstanding if it felt that petitioners in good faith were wrong in their interpretation of the proceedings. It would seem that silence from the Court was an implied acquiescence in petitioners' assertions.

In the third place, it seems highly improper that the Court of Appeals should have no written record or minutes of its proceedings and rulings. There are enough hazards for litigants in any litigation, without adding the unnecessary pitfall of having no record of how the court ruled on certain motions and whether certain pleadings were actually filed or merely tendered.

In the fourth place, since it was the error of the Court of Appeals that no record was being kept and the petitioners were without knowledge of that fact until they attempted to obtain the certified record, the Court of Appeals should have taken steps on its own initiative to correct the situation. There seems to be no particular recognition on the part of the members of the Court of any fault on the part of the Court that no record was kept. The suggestion made by one of the judges that a stipulation be obtained from all attorneys of record was completely unrealistic; first, because it failed to appreciate that opposing counsel would not ordinarily be too disposed to assist their adversaries out of a dilemma, and second, because the judge took that occasion to disseminate his

own divergent views on the matter to all counsel of record as well as to members of the Court. Any counsel, therefore, who supported petitioners' assertions was put in the position of thereby contradicting one of the judges. The Court had a duty to correct, in so far as possible, a record which did not reflect what had occurred in the proceedings.

III. Effect of Amended and Supplemental Pleadings.

(A) The Court of Appeals in the instant case has decided important questions of law which have not been but should be settled by this Court. Petitioners have been unable to find any decisions which answer the questions set out as III(A), III(B) and III(C) in QUESTIONS PRESENTED hereinabove. In the instant case the District Court entered an order dismissing the action on September 30, 1957. On April 17, 1958, by leave of the Circuit Court of Appeals, the petitioners filed a second amended complaint therein, alleging the existence of constitutional questions and praying, additionally, for injunctive relief. On December 1, 1958, by leave of court, petitioners filed a second supplemental complaint asserting affirmative defenses. Four defendants-appellees, by leave of court, subsequently filed answers to both the second amended complaint and the second supplemental complaint. The issues raised by these pleadings and the relief prayed for were substantially different from those before the District Court when it dismissed the action. The judgment of the District Court can have no effect on the pleadings filed after the date of the judgment. It might be argued that an amended complaint relates back to the date of the original complaint. That theory can hardly be valid when the dismissal is under the discretionary power of the court, for true discretion can

only be exercised over what is actually before the court, not over something which is only technically considered to have been before the Court. But in no event could that argument apply to a supplemental complaint and the answers thereto. There is no way, therefore, that the District Court's order can affect the pleadings filed after the date of the order. By the same token, if the District Court's order is affirmed by the Court of Appeals the judgment of the Court of Appeals can have no more effect than the order which it affirms. Nothing in the judgment of the Court of Appeals enlarges, or could enlarge, the scope of the District Court's order. All of the pleadings that were filed in the Court of Appeals remain unaffected by any judgments or orders which have been entered. They have not been dismissed or expunged from the record. Taken together they constitute a valid and subsisting cause of action now pending in the Court of Appeals. By the process of deductive reasoning this conclusion seems inescapable. *Cf. Grubbs* v. *Smith*, 86 F. 2d 275 (C. A. 6, 1936), in which the court held that an amended and substituted pleading superseded the *prior pleadings in the case. The points here involved* were urged on the Court of Appeals in oral argument and in the petition for rehearing. The Court neither answered nor commented on them. Petitioners have been unable to find any authorities in point. Since the questions here presented are important questions involving practice and procedure in the Federal Courts they should be settled by this Court.

IV. District Court's Compliance with the Mandate of the Court of Appeals.

(A) This was one of the important issues before the Court of Appeals on the appeal of the instant case since one of the possible results sought by petitioners was a remand of the case to the District Court with unequivocal directions to follow the former mandate. The Court of Appeals had ordered the District Court to hear the views of the interested parties (Appendix B, *infra*, pp. 54 and 59). The District Court refused to grant a hearing. The Court of Appeals ordered the District Court to consider and rule on the question of jurisdiction (Appendix B, *infra*, pp. 54, 58 and 59). The District Court in its order of dismissal stated that "it is not believed it is now necessary to determine the jurisdictional question" (Appendix B, *infra*, p. 61). The Court of Appeals ordered the District Court to consider and rule on the question of exercise of jurisdiction and specifically stated that the Court of Appeals had not ruled on this question (Appendix B, *infra*, pp. 54, 58 and 59). The District Court in its order of dismissal stated that "it is clearly apparent from the authorities cited and the reasoning in the Court of Appeals that if jurisdiction did exist, it should not be exercised" (Appendix B, *infra*, p. 61). These actions by the District Court seem hardly compatible with compliance with the mandate of the Court of Appeals. On the contrary, they indicate a blatant disregard for, and refusal to follow, the said mandate. In affirming the judgment of the District Court, the Court of Appeals has sanctioned and condoned a departure from the accepted and usual course of judicial proceedings to such a degree as should warrant an exercise of this Court's power of supervision.

V. Jurisdiction.

(A) The question of whether jurisdiction exists in the instant case was first raised by the Court of Appeals in its judgment of February 12, 1957, rendered on a former appeal of certain pre-trial issues (Appendix B, *infra*, pp. 53-54). Petitioners have consistently urged the existence of jurisdiction based, initially, on diversity of citizenship and, since the filing of their amended complaint, on constitutional questions as well. As pointed out hereinabove the District Court refused to decide the question of jurisdiction. The Court of Appeals in its last opinion avoids a direct decision of the issue but deals with certain other issues "assuming that jurisdiction does exist" (Appendix B, *infra*, p. 66). The question of jurisprudence, having once been raised, is too important to be left unanswered. Since the Court of Appeals did not decide that jurisdiction does not exist, petitioners will not burden this Court with a discussion in this petition of the many facets of this issue. A number of the points involved, however, will affect many other cases in the Federal Courts and should be clarified.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

HENRY B. WALKER,
HENRY B. WALKER, JR.,
406 Old National Bank Building,
Evansville, Indiana,
Attorneys for Petitioners.

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